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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LEVAUGHN GAINES, Defendant and Appellant.	C076921 (Super. Ct. No. 11F05181)

After failing to convince his girlfriend not to break up with him, defendant LeVaughn Gaines shot her six times. He pleaded not guilty and not guilty by reason of insanity. (Pen. Code, § 1026, subd. (a).) [1] A jury found him guilty of deliberate and premeditated attempted murder (§§ 664/187, subd. (a)), two counts of assault with a firearm (§ 245, subd. (a)(2)), and inflicting corporal injury on a former cohabitant

[1] Further undesignated statutory references are to the Penal Code.

resulting in traumatic condition (§ 273.5, subd. (a)). The jury found true various firearm and great bodily injury enhancements. (§§ 12022.5, subd. (a); 12022.53, subds. (b), (c), & (d); 12022.7, subd. (e).) In the sanity phase of the trial, the jury found defendant sane at the time of the crimes. The trial court sentenced him to 32 years to life in prison.

On appeal, defendant contends the trial court erred in failing to instruct on brandishing a firearm and admitting expert testimony on domestic violence without the requisite evidentiary foundation. He further contends the prosecutor committed prejudicial misconduct during closing argument of the sanity phase. We reject defendant's contentions and affirm.

FACTS

Defendant's Relationship with Nguyen

Nhi Hoai Nguyen was born in Vietnam and came to Sacramento with her family when she was 13 years old. She has a younger brother and sister. Defendant met Nguyen in high school. They began dating their senior year in April 2009 and kept their relationship secret from their families. The summer after graduation Nguyen discovered she was pregnant. She had an abortion despite defendant's opposition. Nguyen went to college in Berkeley in the fall. Defendant was in college in Sacramento and visited her on weekends; he later transferred to Berkeley City College and lived with Nguyen part of the time.

In the summer of 2011, Nguyen and her family went to Vietnam for a couple of months. Once there, Nguyen decided she wanted to return to Vietnam after college. She realized it would be difficult to live there with someone (like defendant) who was not Vietnamese. The longer she was in Vietnam, the stronger her desire to stay there became. She knew defendant wanted to marry her, but she could not see bringing him to Vietnam and her feelings towards defendant changed. She thought it would be easier to break up if there were another person involved. She told defendant she had a crush on an

old friend named Dat, and that she loved Dat and could be with him in Vietnam. When she returned to Sacramento, she avoided defendant.

The Shooting

Defendant saw Nguyen a week after she returned and they discussed her changed feelings. Defendant had a gun, which he handed to her with instructions to shoot him. On his next visit to Nguyen, defendant took out the gun and played with it, loading and unloading the bullets. Before defendant's third visit (to Nguyen's parents' house), Nguyen texted him: "If u dun need ur gun, then leave it at hm plz." When defendant arrived, Nguyen's parents were gone, but her brother and sister were there. After a while, her brother left.

Nguyen told defendant she was breaking up with him and did not want to be his girlfriend. Her sister heard Nguyen screaming and pounding her head on the table. Nguyen acted frustrated. The sister came out of her room, but Nguyen and defendant told her to go back to her room. The same thing happened again. A friend of the sister arrived and knocked on the door. Defendant kicked the door to keep her out. The sister went to her room and Nguyen followed. Defendant pushed the sister in the room and pulled Nguyen out. He pointed the gun at the sister and told her to go to the room if she did not want to die.[2]

Nguyen's brother returned and knocked on the door. She tried to let him in, but defendant blocked the door, which was chained. Defendant opened fire and shot Nguyen six times--in the left arm, the right arm, the right leg, the abdomen, the chest, and the head. Her right forearm was fractured and her cecum (the first portion of the large

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[2] At trial the sister could not recall whether defendant pointed the gun at her. At the preliminary hearing she had testified he did, and she was impeached with that prior testimony at trial.

intestine) was perforated, exposing her to a possible severe, even fatal, infection. There was a gunshot wound behind her left ear and bullet fragments lodged in her brain.

Nguyen told the police her ex-boyfriend shot her. She said he was upset because she had told him she had cheated on him while she was in Vietnam. She said he wanted to get back together with her.

The police found a brown backpack on the dining room table. Inside were unexpended .22-caliber cartridges, a cell phone, a wallet with defendant's student identification, a prescription bottle in Nguyen's name, medical paperwork relating to the abortion, and a handwritten note. The note spoke of their breakup and said in part, " 'figure since we began with a passionate kiss by your door, we should say goodbye in the same spot.' "

Domestic Violence Evidence

Nguyen failed to come to court five times in response to subpoenas. She visited defendant in jail and they married in January 2013. She eventually testified at trial, described *post*.

At trial, prosecution witness Detective Dennis Prizmich briefly described intimate partner battering (previously battered women's syndrome). He testified it was about power and control; a relationship is good then tension builds to a trigger point and there is a violent act against the victim. The partners reunite and the cycle begins again. He claimed that 80 percent of victims either do not testify or change their story, minimizing the incident by making excuses or downplaying what happened. The victims often reconcile with the person who abused them.

The Defense

Nguyen testified she and defendant had a loving relationship. She felt like there were two different defendants: the one she knew and the one who did the shooting. She felt "it's not Levaughn who did it." She also denied that defendant had threatened her sister, and was impeached with her prior tape recorded statement to the contrary.

Defendant testified he was happy when he learned Nguyen was pregnant and excited to be a father. But Nguyen was scared and worried about her parents, so she had an abortion. Defendant then became depressed and started hearing voices; at first a baby crying and then voices telling him he was a failure because he could not keep his own child. He did not tell Nguyen about the voices and claimed the abortion did not hurt their relationship. By 2010, the relationship was wonderful; it was the best in 2011 when he moved in with her.

When Nguyen went to Vietnam, he called her every day. Then she stopped answering or told him he should not call. He was confused. When she told him she was seeing someone else, "[i]t was a wall in my life." Defendant got depressed; he stopped eating and hanging out with his friends. He began hearing voices again. After he received Nguyen's text that she had had sex with Dat, he was shocked and shut down. The voices told him he was a failure. He got a gun from a safe in the garage; he put one bullet in it and played Russian roulette.

Defendant saw Nguyen twice before the shooting and wanted her to kill him. On the third meeting he felt he wanted to die; if she would not do it, he would. Nguyen was frustrated that he would not let go. She told him to give her time to get used to being back in America. There was a knock at the door; when Nguyen got up to answer, defendant saw a shadowy figure and that was all he could remember. He never intended to kill Nguyen. Defendant blamed the shooting on the shadowy figure, but did not mention seeing it when arrested or until two years after the shooting.

Sanity Phase

Defendant's mother testified he was not himself at the time of the shooting; he was quiet and melancholy. Detective Jeff Spackman testified he spoke with defendant's mother the day after the shooting and she told him she had not noticed any change in defendant's demeanor or attitude during the past few weeks.

Jason Roof was the attending psychiatrist at the Sacramento County jail and was involved in defendant's treatment. Defendant was initially diagnosed with a mood disorder not otherwise specified (NOS). The primary concern was anxiety and depression. Defendant was given Prozac for depression. He was hospitalized three times in the first three months of custody due to concerns that he would harm himself. About a month after his arrest, defendant's diagnosis was more specific: a major depressive disorder, as well as psychosis NOS. Defendant was extremely sad and at times reported he heard voices.

Dr. Roof did not testify as to defendant's sanity at the time of the offenses.[3] He had no opinion as to whether defendant had a mental disease or defect at the time of the shooting or understood the nature and consequences of his acts. Dr. Roof testified the mere diagnosis of a mood or depressive disorder, even with psychotic features, did not necessarily signal that the diagnosed individual did not know right from wrong.

Charles Schaffer, a psychiatrist, had been asked by the court to evaluate defendant's plea of not guilty by reason of insanity. He examined defendant in June 2013. In his opinion, defendant had a mental disease or disorder at the time of the shooting. Dr. Schaffer concluded, however, that defendant knew his acts were wrong and understood the nature and quality of his actions. Defendant claimed he had hallucinated--seeing the hooded figure--at the time of the shooting. Dr. Schaffer found defendant's claim in this regard not credible because defendant did not claim to have seen the figure when talking to the police or the jail psychiatrist or even the victim as an explanation for his actions in shooting her six times.

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[3] "Insanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong." (*People v. Hernandez* (2000) 22 Cal.4th 512, 520.)

In May 2013, defendant was diagnosed with schizophrenia. According to Dr. Schaffer, a diagnosis of schizophrenia is common if psychotic symptoms (meaning out of touch with reality) are reported, such as seeing or hearing things that do not exist.

DISCUSSION

I

Failure to Instruct on Brandishing a Firearm

Defendant contends the trial court erred, requiring reversal, by failing to instruct on brandishing a firearm as an alternative to count four, the assault with a firearm on the sister. Defendant acknowledges that he raises this issue only to preserve it for federal review.

As defendant recognizes, California courts have held that brandishing (§ 417) is not a lesser *included* offense to assault with a firearm, but instead is a lesser r*elated* offense. (*People v. Steele* (2000) 83 Cal.App.4th 212, 218 and cases cited.) Defendant does not challenge these holdings. He also recognizes that the California Supreme Court has held that a trial court need not instruct on a lesser related offense unless both parties agree to the instruction. "A defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties. [Citations.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 668.) Finally, defendant acknowledges that we are bound by decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Here, the defense requested the instruction but the People did not agree. The trial court did not err in refusing to instruct the jury on brandishing.

II

Admission of Expert Testimony on Domestic Violence

Defendant contends the trial court erred in admitting the expert testimony of Detective Prizmich on domestic violence because there was no foundation that defendant's relationship with Nguyen involved a " 'cycle of violence.' " (See *People v. Brown* (2004) 33 Cal.4th 892, 907 (*Brown*).) Defendant contends admission of this testimony requires reversal of count four, the assault on the sister. Defendant argues the evidence on count four was " 'in virtual equipoise' " because at trial the sister could not be certain that defendant had pointed the gun at her and Nguyen testified defendant did not. Defendant argues Prizmich's testimony that 80 percent of victims of domestic violence do not want to prosecute, change their testimony, or minimize the incident allowed the jury to disregard Nguyen's testimony, tipping the balance in favor of guilt.

In *Brown*, our Supreme Court addressed whether expert testimony on the behavior of domestic violence victims is admissible where only one incident of abuse has occurred. The court found such evidence was admissible under Evidence Code section 801 because it would assist the trier of fact in evaluating the credibility of the victim's trial testimony "by providing relevant information about the tendency of victims of domestic violence later to recant or minimize their description of that violence." (*Brown, supra,* 33 Cal.4th at p. 896.) The court did not reach the question whether in such circumstances the evidence would be admissible under Evidence Code section 1107, which makes evidence of intimate partner battering admissible. (*Brown,* at p. 896.)

The court noted "the close analogy between use of expert testimony to explain the behavior of domestic violence victims, and expert testimony concerning victims of rape or child abuse." (*Brown, supra,* 33 Cal.4th at p. 905.) "When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. [Citations.] And when the victim's trial testimony supports the defendant or

minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor. [Citations.]" (*Id.* at p. 906.)

Here, Nguyen's testimony that defendant would not harm her and "it's not him" differed wildly from her statements to the police in which she said defendant shot her probably because he wanted her dead. She reconciled with defendant and married him. Thus the expert testimony about the behavior of domestic violence victims was relevant to assess Nguyen's behavior and her credibility.

In *Brown*, the expert testified that domestic violence victims often recant previous allegations of abuse as part of the behavior patterns common in abusive relationships and that the " 'cycle of violence' " in such relationships can begin with mundane matters, such as complaints about housekeeping. (*Brown, supra,* 33 Cal.4th at p. 907.) The *Brown* court found an adequate foundation for such testimony as there was evidence suggesting the possibility of a similar cycle of violence. The defendant had complained about the cleanliness of the apartment the evening of the attack and the defendant and the victim argued about defendant's failure to take her side in an argument with the landlord (defendant's cousin) about the rent. (*Ibid.)*

Defendant contends there was no similar foundation evidence here of a possible cycle of violence. We disagree that the foundation was problematic. First, we do not read *Brown* to *always* require evidence of a cycle of violence. Rather, *Brown* requires evidence to show the expert's testimony is relevant. Unlike the expert in *Brown*, Prizmich's testimony did not focus on the cycle of violence; he described it only briefly. The majority of his testimony was about the tendency of domestic violence victims to recant or minimize the abuse and to reconcile with the abuser. Further, unlike in *Brown*, here it was uncontested that defendant "abused" Nguyen (by shooting her six times after twice visiting her with gun in hand); the only contested issue was his state of mind. With

this contention, he does not challenge the three counts of conviction naming her as the victim, only count four, alleging he assaulted her *sister* with the gun.

Moreover, there was evidence at trial to suggest a possible power and control struggle inherent in the cycle of violence, as described by Prizmich, which provided additional foundation for his testimony. The relationship began happy, but grew tense once Nguyen decided to end it. Defendant responded in what most would consider an extreme manner--by taking a gun with him when he visited her and asking her to shoot him. On the second visit he loaded and unloaded the gun in front of her. On the third visit, despite Nguyen's asking defendant not to bring the gun, he brought it again. The jury could construe the conduct of defendant as a manipulative attempt to gain control over Nguyen and to get her to agree with him and stay in their relationship. The trigger came with her refusal to be manipulated, when defendant responded with extreme violence, threatening the sister at gunpoint and shooting Nguyen six times.

The admission of expert testimony is reviewed on appeal for an abuse of discretion. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) Because Detective Prizmich's testimony was relevant to assessing Nguyen's conduct and her credibility, and there was a proper foundation, the trial court did not abuse its discretion in admitting the testimony.

III

Prosecutorial Misconduct

Defendant next contends the prosecutor committed prejudicial misconduct in the closing argument in the sanity phase of the trial by suggesting that defendant pleaded not guilty by reason of insanity to avoid punishment and improperly inviting the jury to consider penalty in reaching its verdict.

A. *Background*

During closing argument in the sanity phase of the trial, the prosecutor told the jury the reason the trial proceeded to the sanity phase was "[b]ecause the evidence was so

strong of guilt they had no other choice." He continued, "the way defenses work is this. The first thing you say is I wasn't there. And then once the evidence proves you were there, you say okay, I was there, but I didn't do it. And then you start to take a look at the evidence and it shows you were there and you did do it. Then you say okay, I was there, and I did it, but I didn't mean it. [¶] And then when you look at the state of the evidence is so overwhelming as in this one where a person is charged with trying to kill somebody, and the facts of the case are that they shot them six times, the person takes stock of themselves and says okay, I was there, I did do it. Evidence proves I meant it. So what's next? Two years later for the first time you claim you weren't trying to kill that person, you saw a shadowy figure you were shooting at and it just so happened all the bullets hurt that person who at that point in time was absolutely ruining your life."

Later, the prosecutor argued the wounds Nguyen suffered showed defendant intended to kill her. "It's not a claim. It's not a story about a phantom. It's not a way to try to wiggle out of responsibility. It's the truth of what happened."

Although the trial court had already instructed the jury, during a break defense counsel requested the court instruct the jury with the bracketed portion of CALCRIM No. 3450 because counsel's argument was "basically making a reference to a get out of jail free" card. The court reread CALCRIM No. 3450, this time including the bracketed portion as follows: "If you find the defendant was legally insane at the time of the crimes, he will not be released from custody until a Court finds he qualifies for release under California law. Until that time he will remain in a mental hospital or outpatient treatment program if appropriate. He may not generally be kept in a mental hospital or outpatient program longer than the maximum sentence available for his crimes. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime. Your job -- rather you must not speculate as to whether he is currently sane or may be found sane in the future. [¶]

You must not let any consideration about where the defendant may be confined nor for how long affect your decision in any way."

The prosecutor continued his argument, addressing this instruction. He reiterated that the jury was not to consider penalty or where defendant might be confined. Instead, he was asking the jury to consider why a person would claim insanity when he was sane. It could be that the person thought he would prefer a mental hospital or outpatient treatment program to "regular jail." The prosecutor argued that was "a pretty old motivation" and referred to the movie One Flew Over the Cuckoo's Nest (1975) as an example. The prosecutor also offered another motivation: to help defendant explain to Nguyen why he shot her.

B. *The Law*

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A defendant's possible punishment is not a proper matter for jury consideration. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 157, fn. 4.) An argument referring to penalty is misconduct. (See *People v. Holt* (1984) 37 Cal.3d 436, 457-458.)

An argument that a verdict of not guilty by reason of insanity will result in defendant being set free is misconduct. (*People v. Babbitt* (1988) 45 Cal.3d 660, 704 [improper to suggest an accused found insane is let free]; *People v. Sorenson* (1964) 231 Cal.App.2d 88, 91, 92 [" 'turns him loose' "]; *People v. Castro* (1960) 182 Cal.App.2d 255, 259 [argument that a verdict of not guilty by reason of insanity would in effect free the defendant]; *People v. Johnson* (1960) 178 Cal.App.2d 360, 369 [" '*so the man walks free and clear of this charge*' "]; *People v. Mallette* (1940) 39 Cal.App.2d 294, 299 ["she will walk out free if you find she was insane"].)

C. *Analysis*

We do not read the prosecutor's initial argument as inviting the jury to consider the penalty in deciding whether defendant was insane at the time of his crimes or as a suggestion that a finding of sanity might turn defendant loose to reoffend. Rather, we interpret the argument to suggest that because the evidence of defendant's guilt was so strong, defendant, who would not accept full responsibility for his actions, felt an insanity plea was his only option. In any event, any error was cured by the court's further instruction, explaining that a finding of insanity was not a "get out of jail free" card, and expressly telling the jury not to consider where or for how long defendant would be confined in making its decision. Absent evidence to the contrary, we presume the jury followed the court's instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 217.)

Defendant contends the prosecutor's attempt to straighten out any confusion over his earlier argument served only to exacerbate the error. He does not, however, explain why this is so. Further, he failed to object to this argument. "A defendant cannot complain on appeal of error by a prosecutor unless he or she made an assignment of error on the same ground in a timely fashion in the trial court and requested the jury be

admonished to disregard the impropriety. [Citations.]" (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1006-1007.) Defendant claims a further objection would have been futile. He relies on the exception to the requirement of an objection "when misconduct was pervasive, defense counsel had repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501-502.) This is not such a case. The misconduct, if any, was not pervasive; defense counsel's request for further instruction was promptly granted, and there is *no* evidence of a poisonous courtroom atmosphere. A more likely reason for the failure to object was that defense counsel found the argument unobjectionable and believed the court's further instruction had corrected any misunderstanding or misperception generated by the prosecutor's earlier comments.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

ROBIE, J.